IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 11TH SEPTEMBER 2007 / 20TH BHADRA 1929

RSA.No. 601 of 2004()
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AS.47/1996 of III ADDL. DISTRICT COURT, KOLLAM
OS.291/1993 of MUNSIFF COURT, KARUNAGAPPALLY
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APPELLANT/RESPONDENT/PLAINTIFF:
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DAMODARAN POTTY SANKARAN POTTY,
KOTTARATHIL MADATHIL, THEKKEMURI,
KIZHAKKEKARA MURI, THAZHAVA VILLAGE.

BY ADV. SRI.P.VIJAYAKUMAR

RESPONDENTS/ APPELLANTS/DEFENDANTS:
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1. TRAVANCORE DEVASWOM BOARD,
REPRESENTED BY ITS SECRETARY,DEVASWOM BOARD OFFICE
NANDANCODE, THIRUVANANTHAPURAM.

2. THE ASSISTANT DEVASWOM COMMISSIONER,
ASSISTANT DEVASWOM COMMISSIONER'S OFFICE,
KARUNAGAPPALLY.

BY ADV. SRI.U.K.RAMAKRISHNAN, SRI.E.K.MADHAVAN
SRI.P.V.LOHITHAKSHAN, SRI.V.KRISHNA MENON
SMT.P.VIJAYAMMA, SMT.UMA GOPINATH, SRI.SANDEEP.E.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 11/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

No representation for appellant. Appeal dismissed for default.

Sd/-M.SASIDHARAN NAMBIAR,
JUDGE.

ORDER ON I.A.NO.1050/04 IN RSA 601/04
DISMISSED

11/9/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.
//True copy//

PA to Judge.

**M.SASIDHARAN NAMBIAR,J.**

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R.S.A.NO. 601 OF 2004

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Dated 17TH December 2007

**J U D G M E N T**

Plaintiff in O.S.291/1993 on the file of Munsiff court, Karunagappally is the appellant. Defendants are respondents. Appellant instituted the suit seeking a decree for declaration and recovery of plaint B schedule property contending that plaint B schedule property forms part of plaint A schedule property which was obtained under Ext.A1. It was contended that Thazhava Srekrishnaswami temple originally belonged to four Malayala Brahmin families and subsequently they surrendered the temple to Travancore State and now the temple vests with first respondent Devaswom Board. It was contended that on the immediate west of the temple property is A schedule property in survey No.5126 and A schedule property was having well defined boundaries and a fence to differentiate it from temple property. In 1106 M.E elder most member of Variyar family executed sale deed in favour of father of the

appellant and in 1123 a lease deed was executed by Devaswom as venpattam and subsequently appellant purchased jenm right from the Land Tribunal in suo motu proceeding 1401/1971 and plaint schedule property is situated on the immediate west of temple Mythanam and for the convenient performance of temple rights and rituals temple property in survey No.5125 was not cultivated and no trees are allowed to grow therein and A schedule property which is situated immediate to the west of the property was cultivated and residential building was constructed therein and A schedule property was lying in lower level than the temple property and remnants of old compound wall is still present and respondents and certain people who are self styled members of the temple advisory committee created documents to show that temple property and A schedule property are surveyed and they annexed 1 cent of property from A schedule property, which is described as B schedule property and transformed it as part of survey No.5125 and subsequently they planted granite pillars and put up a fence enclosing that property along with the remaining temple property. It is contended that respondents have no right over that property and appellant and his

predecessors have been in possession of the property and appellant is entitled to a decree for recovery of possession of plaint B schedule property on the strength of title and even if temple has any right over the property, it was lost by adverse possession and limitation.

2. Respondents in the written statement admitted the purchase certificate obtained by appellant in suo motu proceeding, but contended that plaint B schedule property does not form part of the leasehold property or property for which Land Tribunal granted purchase certificate. It was contended that before granting purchase certificate, properties were measured and the boundaries were fixed and appellant was found to be entitled to only survey No.5126 and 5128 and temple property is in survey No.5125 and B schedule property is part of that property and appellant is not entitled to a decree for recovery of possession as he has no right or title to the property.

3. Learned Munsiff on the evidence of Pws.1 and 2, Dws.1, CW1 and Exts.A1 to A7, B1 to B3 and C1 granted a decree holding that plaint B schedule property forms part of plaint schedule property and plaint B schedule property was encroached by respondents and appellant has title to

the plaint B schedule property under Exts.A1 to A3 and granted a decree for recovery of possession. Respondents challenged the judgment before District court, Kollam in A.S.47/1996 Learned Additional District Judge on re-appreciation of evidence found that appellant is having right and title only to the property in survey No.5126 and admittedly temple property is in survey No.5125 and plaint B schedule property forms part of survey No.5125 and appellant is therefore not entitled to claim any right or title to said property and set aside decree granted by the trial court and allowed the appeal and dismissed the suit. It is challenged in the second appeal.

4. When appeal came up for admission notice was issued to respondents before admitting the appeal. First respondent appeared. Learned counsel appearing for appellant and first respondent were heard.

5. Arguments of learned counsel appearing for appellant is that the lease hold right obtained by predecessor in interest of the appellant under Ext.A1 and A2 was not only not disputed but also admitted and accepting the lease hold right Land Tribunal granted Ext.A3 certificate of purchase pursuant to the order in S.M.P.1401/1971 and trial court appreciating the evidence

in the proper perspective found that plaint B schedule property is part of plaint A schedule property covered under Ext.A3 purchase certificate and appellant has title to plaint B schedule property. It was argued that first appellate court merely on basing on survey number non suited the appellant. It was argued that it is settled law that when there is dispute with regard to identity of the property with reference to survey number and boundaries, property is to be fixed with reference to the boundaries and first appellate court did not consider that aspect at all and hence finding of the first appellate court is not sustainable. Relying on the decision of Apex court in **Chandrasekharan and others v. Kanakarajan and others (2007(5) SCC 660)** it was argued that failure of first appellate court to consider the documents of title with reference to the boundaries is an omission which is a substantial question of law and if the property is fixed with reference to the boundaries, plaint B schedule property shall form part of plaint A schedule property and appellant is entitled to the decree sought for. Learned counsel further argued that under Ext.A1 eastern boundary of the plaint A schedule property is temple courtyard (Thirumuttam) and therefore lease hold property

extended upto the temple courtyard and plaint B schedule property is touching the temple courtyard and therefore it forms part of the lease hold property and appellant has title to the property. Learned counsel also argued that Ext.C1 report submitted by the Commissioner with Ext.A4 report submitted by the Commissioner in earlier suit which is proved by the examination of CW1 establish that plaint B schedule property forms part of the lease hold property and therefore appellant has title to the plaint B schedule property and judgment of the first appellate court is not sustainable. Learned counsel appearing for first respondent argued that even in the plaint, appellant claimed title only to the property in survey No.5126 and not survey No.5125 which is the temple property and as plaint B schedule property is in survey No.5125, appellants cannot claim title to the plaint B schedule property which forms part of the property in survey No.5125 belonging to the temple and based on the boundaries in Exts.A1 to A3 appellant cannot claim title to plaint B schedule property and no substantial question of law is involved. Learned counsel appearing for appellant also argued that even if plaint B schedule property forms part of survey No.5125, appellant

contended that title of respondent has been lost by adverse possession and hence for the sole reason that plaint B schedule property in survey No.5125, appellant cannot be non suited.

6. On hearing the learned counsel I do not find any substantial question of law involved in the appeal. Appellant is claiming right and title to plaint B schedule property contending that it forms part of plaint A schedule property covered under Ext.A1 and Ext.A2 lease and Ext.A3 purchase certificate granted by Land Tribunal. Right and title of the appellant to the property covered under Exts.A1 to A3 was not disputed. Dispute is only with regard to a narrow strip of land having an extent of 1 cent, which lies to east of the admitted properties of the appellant and to the west of the temple. As found by first appellate court in the plaint itself appellant admitted that temple property is in survey No.5125. The property obtained by the predecessor in interest of the appellant under Ext.A1 and A2 is in survey No.5126 and 5128. If property is to be fixed with reference to survey number, as found by first appellate court, appellant cannot claim title to the plaint B schedule property which is in survey no.5125, unless he has perfected the title

by adverse possession and limitation. Argument of learned counsel is that when there is dispute on the identity of the property, it is to be fixed with reference to the boundaries. Argument is that eastern boundary of the property covered under Ext.A1 is the temple courtyard (Thirumuttam) and therefore lease hold property extents upto the temple courtyard. True Ext.A1 shows that lease hold property is lying to the west of temple Thirumuttam though it does not show that it is touching to the temple. Eastern boundary of the lease hold property is not shown either as the temple property or the courtyard. But in Ext.A2 the eastern boundary is shown as survey no.5125. Therefore if the property is to be fixed in accordance with the boundaries, under Ext.A1 it is to be , to the west of temple courtyard. So also if it is to be fixed with reference to the boundaries in Ext.A2, it can only be to the west of survey boundary of survey No.5125. Similarly eastern boundary in Ext.A3 purchase certificate is temple. Therefore it is not possible to fix plaint B schedule property as part of the property obtained under Exts.A1 to A3 by identifying the property with reference to the eastern boundary as canvassed by the appellant. Though Ext.A1 mentions the eastern boundary as

temple courtyard, as stated earlier, it does not show that it is touching the temple courtyard, but only mentions as to the west of temple courtyard. When Ext.A2 was executed boundaries were specified and eastern boundary shown as to the west of survey No.5125. If that be so, appellant cannot claim title to any portion of survey no.5125, as lease hold could only be to the west of survey no.5125 and if so it could only be in survey no.5126, as rightly found by first appellate court. If that be so, appellant cannot claim title to plaint B schedule property based on the description or boundaries as shown in Exts.A1 to A3.

7. Then the only question is whether appellant can claim title to the plaint B schedule property by adverse possession. Till 1/1/1970 appellant continued to be the tenant of the temple. Therefore as a tenant he cannot perfect title against landlord temple. So adverse possession can be claimed only after 1/1/1970. Appellant can claim title perfected by adverse possession only if he has been in possession of property with the necessary animus to possess it against the true owner. Necessarily appellant has to recognise that temple is the owner of plaint B schedule property. When appellant has no such case and he continued to contend that plaint B schedule

property forms part of lease hold property, which is disproved he cannot claim title by adverse possession also. Hence I find no merit in the appeal. Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.